

Seiden v Doria

2019 NY Slip Op 33591(U)

December 6, 2019

Supreme Court, New York County

Docket Number: 451140/2018

Judge: Adam Silvera

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ADAM SILVERA PART IAS MOTION 22

Justice

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STEVEN SEIDEN,

Plaintiff,

- v -

EVAN RICHARD SCOTT DORIA, SUSAN DORIA

Defendant.

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INDEX NO. 451140/2018
MOTION DATE 07/03/2019
MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 55, 56, 57, 58, 59, 60 were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER)

Upon the foregoing documents, it is ORDERED that plaintiff's motion for summary judgment, pursuant to CPLR 3212, is granted on the issue of liability against defendants. Plaintiff's motion contends that on November 24, 2017, at the intersection of Main Street and Baker Street in Cortlandt/Mohegan Lake, County of Westchester and State of New York, a vehicle operated by defendant Evan Doria and owned by defendant Susan Doria, crossed over a double yellow line and struck plaintiff and co-plaintiff as they were crossing the street in an unmarked crosswalk. Defendants oppose the motion.

"The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (Winegrad v New York University Medical Center, 64 NY2d 851, 853 [1985]). Once such entitlement has been demonstrated by the moving party, the burden shifts to the party opposing the motion to "demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action or tender an acceptable excuse for his failure ... to do [so]" (Zuckerman v City of New York, 49 NY2d 557, 560 [1980]).

Violation of the Vehicle and Traffic Law (“VTL”) constitutes negligence per se (*See Flores v City of New York*, 66 AD3d 599 [1st Dep’t 2009]). Pursuant to Vehicle and Traffic Law 1130(1), “[w]henver any highway has been divided into two or more roadways by leaving an intervening space or by a physical barrier or clearly indicated dividing section so constructed as to impede vehicular traffic, every vehicle shall be driven only upon the right-hand roadway unless directed or permitted to use another roadway by official traffic-control devices or police officers. No vehicle shall be driven over, across, or within any such dividing space, barrier, or section, except through an opening in such physical barrier or dividing section or space or at a crossover or intersection, as established, unless specifically authorized by public authority.” VTL 1146 places a duty upon motorists to exercise due care in their operation of a motor vehicle and avoid colliding into any pedestrian.

Here, both plaintiffs testified that before entering the roadway they looked both ways and waited at the corner for traffic to clear for them to cross at an intersection with no electronic control devices or temporary traffic control devices (Mot, Exh 5 at 15-16, 23, & 26-27; Exh 6 at 35 & 39). Defendant testified that as he approached Main Street that he was speeding ten miles per hour in excess of the speed limit of 45 miles per hour (Mot, Exh 8 at 67, lines 6-17). Plaintiffs attach the affidavits of two eyewitnesses to the scene of the accident, Ronald Abad and Patricia Sansourekidou, who testified that they observed defendants’ vehicle strike plaintiffs (Mot, Exh 11 & 12). Mr. Abad affirmed that the two pedestrians were struck by defendants’ vehicle in the westbound lane of traffic (*id.*, Exh 11 at 2). Ms. Sansourekidou affirmed that defendants’ vehicle was speeding, lost control, and went over the lane into the opposite direction striking two men (*id.*, Exh 12 at 2).

Thus, plaintiff has made a prima facie showing of defendant's negligence. In opposition, defendants claim that triable issues of fact exist as to the happening of the subject accident. Defendants claim that their vehicle crossed the double-yellow into opposing traffic only because defendant Evan Doria "hit these road plates that were in the road while they were doing construction" causing his brakes to give out (Aff in op, Mot, Exh 8 at 66). Defendants have provided no evidence that defendants' vehicle's breaks failed at the time of the accident. Further, defendant Doria's testimony that he was speeding up until the time of the accident demonstrates that contact with "road plates" did not constitute a non-negligent excuse as defendant's loss of control of the vehicle arose due to his own conduct.

Defendants allege that plaintiffs were crossing the street outside of a crosswalk when the subject accident occurred. Plaintiff's papers note that plaintiffs were crossing the street in an "unmarked crosswalk" when they were struck; however, whether plaintiffs were in a crosswalk at the time of the accident does not bar plaintiff from summary judgment on the issue of liability. The Court of Appeals has held that a plaintiff is entitled to partial summary judgment on the issue of a defendant's liability even if a defendant raises an issue of fact regarding plaintiff's comparative negligence (*Rodriguez v City of New York*, 31 NY3d 312 [2018]). Further, defendants' assertion that plaintiffs were not within a cross-walk at the time of the accident are founded upon plaintiffs' statement that they were walking in an "unmarked crosswalk" when they were struck by defendants' vehicle.

The accident at issue merits granting an order for summary judgment on the issue of liability finding plaintiffs free from any comparative negligence. "Subdivision (a) of section 110 of the Vehicle & Traffic Law clearly recognizes that a crosswalk at an intersection need not be delineated by lines or other markings on the road's surface" (*Kochloffel v Giordano*, 99 AD2d

798, 799 [2d Dept 1984] citing *Fan v Buzzitta*, 42 AD2d 40, 42 [2d Dept 1973] [finding that although the area of the intersection where plaintiff crossed the road was not marked as a crosswalk, there was sufficient evidence to conclude that plaintiff was within an unmarked crosswalk at the time of the incident]). Here, it can be so adduced from photographic evidence and testimony provided by plaintiffs that the area in which plaintiffs were crossing was an unmarked crosswalk. The Court finds that defendants' argument that plaintiffs could have been contributorily negligent for the happening of the underlying accident unavailing.

Thus, plaintiff has demonstrated a prima facie showing of defendants' negligence and defendant has failed to raise an issue of fact. Plaintiff's motion for summary judgment, on the issue of liability, as against defendants, deeming plaintiff Steven J. Seiden free from comparative fault and dismissing defendants' defense of comparative negligence is granted.

ORDERED that plaintiff's motion for summary judgment is granted on the issue of liability as against defendants; and it is further

ORDERED that the branch of plaintiff's motion to dismiss defendants' affirmative defenses related to comparative negligence of plaintiff is granted; and it is further

ORDERED that within 30 days of entry, counsel for plaintiff Steven J. Seiden shall serve a copy of this Decision/Order upon all parties with notice of entry.

This constitutes the Decision/Order of the Court.

12/6/2019
DATE

ADAM SILVERA, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>
	<input type="checkbox"/>	DENIED	<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	REFERENCE	<input type="checkbox"/>